

## Getting Aboard

### Lawyers, Once Chary Of Big Tobacco, Rush To Line Up Plaintiffs

They Run Ads, Screen Callers For Litigation Potential; 'Use an Oxygen Tank?'

#### A Wealth of New Documents

By JEFFREY TAYLOR

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The late-night TV commercial blares: "If you suffer from a smoking illness, you may have a right to get into the tobacco companies. Settlement talks have begun, so you must act immediately!" The face of Washington, D.C., lawyer Wayne Cohen fills the screen, beneath the flashing words "Tobacco Victims' Rights."

The ad has already brought in 150 clients. "It's nonstop tobacco calls," says Mr. Cohen, whose usual specialties are traffic accidents and medical malpractice. "There's so many plaintiffs out there."

For decades, tobacco lawsuits were regarded as expensive and unwinnable.

#### Setback for Tobacco Firms

The Senate overwhelmingly approved a nonbinding resolution to deny legal relief to cigarette makers. Meanwhile, Congress is being asked to set aside \$20 billion from any tobacco accord to compensate asbestos victims who smoked. Articles on pages A3 and B6.

Cigarette companies besieged the few plaintiffs' lawyers who dared take them on with voluminous requests for discovery, intimidating and overwhelming the lawyers.

In mid-1996 a Florida lawyer, Norwood "Woody" Wilner, won a \$750,000 verdict against B.A.T Industries PLC's Brown & Williamson Tobacco Corp., damaging the aura of invincibility. That victory, on appeal, remains the only blemish on the industry's record. And just this month, a jury in Indiana handed the industry another victory, ruling that cigarette makers shouldn't be held liable for the death of a nonsmoking nurse exposed to second-hand smoke.

But while the industry's record still intimidates many, dozens of plaintiffs' lawyers now are choosing to take on the legal Goliath. Mr. Wilner, for instance, filed nearly 150 new tobacco cases last year. He has been encouraging other lawyers to follow suit, arguing that thousands of newly disclosed industry documents make lawyers' job easier. "Whether my colleagues will have success on their first trip to the courthouse, I don't know, but they'll have it" eventually, he predicts.

Legal scholars say these new tobacco combatants are taking a substantial but calculated risk. "I'd compare these lawsuits to the riskier stocks in an investor's portfolio," says John C. Coffee Jr., a law professor at Columbia University. "You don't want to load up on them, but taken in moderation, they give you a chance for a big payoff."

The lawyers are likely to be encouraged by legislation now emerging from the Senate Commerce Committee. It would deny the industry key protections envisioned by last June's proposed settlement with state attorneys general, such as a ban on class-action tobacco suits and immunity from punitive damages for past misconduct. The bill's \$6.5 billion annual cap on legal payments would limit the amount tobacco plaintiffs could collect, but also force the industry to pay at least that much into a settlement fund each year.

Even before this surprise turn in Congress, lawyers were scrambling to round up cancer and emphysema victims and get cases filed.

Some have been amassing clients in hopes that Congress will create an administrative-claims process, allowing them to collect without the bother of litigating. That remains a possibility; one senator, Republican Jeff Sessions of Alabama, is



Wayne Cohen

pushing to create such a process, albeit one that would limit lawyers' fees to 10% of the amount recovered.

In Chicago, lawyer Kenneth Moll sees a unique route to the big payday. He is trying to consolidate every tobacco-related lawsuit filed in federal court. He has also filed a suit seeking to represent every tobacco user in Illinois. Of the nearly 2,000 smokers he says he represents, he chose a woman named Lee Daley as the "named plaintiff" for the class action. Why? "She happened to have the same last name as the mayor of our city," Mr. Moll says.

In Baltimore, personal-injury attorney Donald Saiontz signs up cancer and emphysema patients by mailing them retention agreements. His television ads have brought in 300 clients so far, he says. "We're going to wait to see what Congress does before we start to file things," Mr. Saiontz says.

In many ways, Mr. Cohen typifies the new wave of tobacco litigants. Brash, aggressive and enterprising, he runs his own law firm and doesn't mind taking a few chances. "I will lose more cases than I win," he says, "but you can't hit a home run unless you swing the bat."

His screening methods might startle some of his clients. On one day, a woman named Barbara Johnson calls on behalf of



# Lawyers Seek Clients to Sue Big Tobacco

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her husband, who she says has been diagnosed with emphysema. Mr. Cohen questions her energetically, asking whether her husband uses an oxygen tank or an inhaler. (He doesn't.) The lawyer then urges her to obtain her husband's medical records quickly and call him back. "Imagine you had a lottery ticket," he says. "You're not going to wait around, right?"

Hanging up, he offers a bleaker assessment to a visitor: "Probably not a case," he says. "He's not on oxygen. Not going to present well to a jury."

Another caller is turned down because the victim, the caller's wife, died of pancreatic cancer. "The chances are zero that this guy will ever get a settlement," he says. "We get a lot of calls about illnesses that may be tangentially related to smoking, but we're not filing those."

Later, Mr. Cohen meets with a client named John L. Smith. His wife, Betty, has lost her larynx to cancer. Mr. Cohen listens as Mr. Smith explains how she uses a device to clean her trachea after each meal. She will need to bring oxygen, Mr. Smith says, to a forthcoming deposition. "I can't imagine two nicer people to sit in front of a jury than you and your wife," Mr. Cohen says, smiling.

Still, he warns Mr. Smith to temper his expectations: "We've thrown a whole bunch of junk against the wall, and some of it may fall off. No false hopes."

## Quick Reaction

Out on the street, a siren wails. "I got offices right on Connecticut Avenue so I could throw my business card out the window when ambulances go by," Mr. Cohen says. He means it as a joke, but like many jokes, the remark has resonance. Within days of last June's announcement of a proposed industry settlement, Mr. Cohen had produced a brochure on tobacco cases and begun mailing it to potential clients. A photo of a swinging pocket watch on its cover was intended to convey a sense of urgency.

Since then, his client roster has swollen

with tobacco cases, and he has become more selective. Mr. Cohen takes only victims of emphysema, lung cancer and throat cancer, diseases that he says have the most direct link to smoking. He refuses clients in their 30s, even if they have lung cancer, because of the warnings being printed on cigarette packages at the time they started smoking.

A veteran of the often-chaotic District of Columbia court system, he prefers this local venue to federal court, where his industry adversaries, he says, are often granted deference because of the prestige of their law firms. He also likes the fact that jury pools are heavily African-American. His roster of cancer and emphysema victims is "99% black," he says, and he expects these plaintiffs to get sympathetic receptions from Washington juries. He encourages lawyers elsewhere to follow his example: Chicago, Watts in Los Angeles, and Brooklyn and the Bronx in New York City are areas likely to be especially unfriendly to tobacco companies, he says.

Plenty of lawyers are interested. Attendance at twice-yearly tobacco-litigation conferences run by Mealey Publications Inc., of Upper Merion, Pa., has surged to an average of 133 lawyers from 76 before the settlement proposal. In federal courts, 80 tobacco-related suits were filed last year, up from 35 in 1996 and only two in 1995. A new group, the Tobacco Trial Lawyers Association, is coordinating efforts.

## Cracks in the Wall

The biggest cigarette makers have never settled with individual smokers. They have always fought hard and nearly always won. But recently they paid huge sums to settle suits brought by state attorneys general and a second-hand-smoke case brought by flight attendants in Florida. More victories, Mr. Wilner predicts, would "bring them out from behind the barricades" to begin settling the strongest individual suits.

Many industry documents have become available just since last June's settlement proposal. Some result from Minnesota At-

torney General Hubert "Skip" Humphrey's taking on the tobacco companies, in a lawsuit that is now in trial. Republican Rep. Thomas Bliley of Virginia subpoenaed and released more than 800 documents in December. Democratic Rep. Henry Waxman of California also has released batches of them.

The quest by plaintiffs' lawyers for clients isn't without its problems. Critics deride such attorneys as smoking's ambulance chasers, and the rush to the courthouse threatens to exacerbate the image problems plaintiffs' lawyers face in the Republican-controlled Congress.

"It's like an armored truck turned over on the highway," says Rep. Scott McInnis, a Colorado Republican who, at the request of House Speaker Newt Gingrich, has written a bill to cap the fees of a handful of plaintiffs' lawyers who helped to negotiate the proposed settlement. "Some people start to grab, and then everybody's grabbing. The ethics of the practice are going to be stretched to the very limit."

Some lawyers never intend to litigate on behalf of their dying clients and will file claims only if Congress creates a fund that can be tapped by an administrative process, Mr. Cohen says. He disavows any such intention himself.

## Criticism of Moll's Plan

Other lawyers complain that tactics like those of Mr. Moll, the Chicago lawyer seeking to aggregate cases under multidistrict litigation, could compromise the legal rights of cancer- and emphysema-stricken clients, both his and theirs. "The facts are unique in tobacco cases — based on how much people smoked, how often they changed brands — and the more variation you have, the less utility there is in lumping them together," says Lee Sanders, a San Francisco lawyer who filed his first tobacco-related suit four years ago. If Mr. Moll succeeds in getting all

federal tobacco cases consolidated under one judge, "I can't do any discovery that's not approved by that judge," Mr. Sanders says.

But Mr. Moll thinks his idea will be popular with judges. "Two thousand cases take a long time to try," he says. "Judges don't like clogged dockets."

A seven-judge panel is expected to consider Mr. Moll's consolidation petition in May. Prof. Coffee at Columbia thinks it has a decent chance of approval, despite opposition from the tobacco industry. "He's got to make a good case that there's going to be substantial duplication of effort without such a process," Mr. Coffee says.

Mr. Moll frowns on lawyers who advertise for clients, but he pays to place news releases on public-relations wires and holds news conferences to announce his suits. His high-profile cases, including one he has filed on behalf of boxing fans he says were defrauded when Mike Tyson bit Evander Holyfield's ear and got himself disqualified, have made Mr. Moll a frequent presence on TV news and talk shows. He doesn't need to advertise to reach cancer patients, he says in his Chicago brogue: "I've got them lining up outside the door."

## A Scoring Grid

Mr. Moll plans to propose paying claims on the basis of a "grid" of factors about the individual patient, including age and the severity and types of disease. "We're going to approach the tobacco industry with the grid," he says. "We're going to say, 'Here's a model that should be used for settling individual cases in Illinois, and let's see if it works and becomes the national model.'"

In Baltimore, Mr. Saiontz's firm offers a kind of legal smorgasbord. While the firm is "primarily known for handling auto accidents," a recording informs callers, "we also handle workers' compensation, medical malpractice, cerebral palsy, birth injuries . . . defective products and bankruptcy matters" in addition to "criminal and defense matters."



In tobacco cases, Mr. Saiontz asks his clients to sign agreements turning over 40% of whatever the firm recovers, compared with the customary 33%. "That's on the high end," Prof. Coffee says. "That's the level usually reserved for the very best trial lawyers."

Mr. Saiontz sees no problem with stockpiling clients, but others do. Says Mr. Sanders: "You can't keep a widow whose husband died of lung cancer from hiring another lawyer if you don't intend to take the trouble to file her lawsuit." Mr. Saiontz says it takes time—six to eight months—to file the kinds of suits he contemplates.

In many ways, Mr. Wilner remains ahead of the curve. Courts in Jacksonville and Tampa, Fla., have set trial dates for his clients, and Mr. Wilner says he is

working with lawyers in Fort Lauderdale, Memphis, Tenn., Birmingham, Ala., and Charleston, W.Va., to file more cases.

Mr. Wilner's trial-court victory on behalf of retired air-traffic controller Grady Carter has given him considerable clout, both among his legal brethren and on Wall Street. Tobacco-company stocks fell a year ago after, at an Atlanta tobacco conference, Mr. Wilner held aloft a document about RJR Nabisco Holdings' RJ Reynolds Tobacco Corp. scientific and medical disclosures.

He no longer uses TV ads to drum up business, he says. But he doesn't apologize for using them in the past: "People dying of cancer don't go to the country club," Mr. Wilner says. "They watch TV."